In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 92

MABEL BLACK and T. Y. WULFF, in a representative capacity for, by and on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America, its officers and members,

Petitioners,

vs.

CUTTER LABORATORIES, a corporation,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

~~**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**~~

~~**and**~~

BRIEF OF NATIONAL LAWYERS GUILD, SAN FRANCISCO CHAPTER, AMICUS CURIAE.

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To the Honorable Earl Warren, Chief Justice of the United States Supreme Court, and to the Honorable Associate Justices of the United States Supreme Court:

Comes now National Lawyers Guild, San Francisco Chapter, and moves for leave to file the attached brief as amicus curiae in support of the petitioner.

The National Lawyers Guild, as the records of this Court show, is a bar association national in character and membership, of which the San Francisco Chapter is a constituent organization. The members of the bars of the several states comprising the National Lawyers Guild have since its organization been primarily concerned with the constitutional and civil liberties of the people. The accompanying brief amicus curiae argues the impact of the decision of the Court below upon rights guaranteed by the First Amendment, and as a danger to democracy, which are not fully covered in the briefs for petitioner. The argument is briefly set forth in the Summary of Argument, a part of the brief.

The brief and motion are accompanied by the consent of counsel for both parties.

For the foregoing reasons amicus curiae moves for leave to file the attached brief in support of the petitioner.

Dated, San Francisco, California,
April 20, 1956.

Respectfully submitted,

CHARLES R. GARRY,

Attorney for National Lawyers Guild, San Francisco Chapter, Amicus Curiae.

BRIEF OF NATIONAL LAWYERS GUILD, SAN FRANCISCO CHAPTER, AMICUS CURIAE.

SUMMARY OF ARGUMENT.

I. The Decision Below Infringes First Amendment Rights.

Although the decision of the Court below does not mention the First Amendment or recognize that First Amendment rights are involved here, such rights are necessarily involved because the decision of the court below is predicated upon membership in the Communist Party alone. *Dennis v. United States,* 341 U.S. 494.

By characterizing membership in and activity of the Communist Party as merely criminal, the Court below cannot effectively disguise the fact that whatever its other activities may be, some of the activities of the Communist Party are exercises of the rights to speech, press and assembly. The principal issue in the various trials that have taken place under the Smith Act, 54 Stat. 671, has been whether in teaching their doctrines the Communists have thereby taught and advocated the necessity or propriety of a violent overthrow of the Government of the United States. This is a dispute about the meaning of ideas and speech. Insofar as the decision below penalizes *all* Communist activity without distinction, it necessarily penalizes protected activity. It thereby infringes the rights guaranteed by the First Amendment.

II. The Infringement of First Amendment Rights in This Case Is Unconstitutional.

The interests which the Supreme Court of California by its decision seeks to protect are: an employers' right to have employees who are personally loyal to him; the protection of an employer from civil liability for damages in a personal injury or wrongful death case arising from wilful adulteration of its products by a Communist employee; the protection of the employer and his customers against sabotage; and the protection of the Government of the United States against destruction. The first three of these interests are too insubstantial to warrant infringement of First Amendment rights. *Dennis v. United States*, supra; *Thomas v. Collins*, 323 U.S. 516.

The protection of the Government of the United States from destruction is not effectively to be achieved by denying to a member of the Communist Party reinstatement in a job in private employment where she has been wrongfully discharged by reason of her union activity. The protection of the Government of the United States against destruction is a matter in which the states have a substantial interest, but its achievement by the method used here seems too remote to warrant violation of the First Amendment as incorporated in the Fourteenth Amendment. *Whitney v. California*, concurring opinion, 274 U.S. 357.

The decision below does not meet the clear and present danger test. No evidence appears in the record of any danger to the state which the state may constitutionally avert, nor that any apprehended danger is imminent, nor of the dedication of the employee whose discharge was the

subject of dispute to any dangerous course of conduct. Alleged membership in the Communist Party alone is said to justify the result here. This is unconstitutional. *Wieman v. Updegraff*, 344 U.S. 183.

III. The Decision Below Is Dangerous to Democracy.

By refusing to recognize the First Amendment question raised by this case, the Court below is shirking its duty to protect the fundamental liberties guaranteed by that Amendment.

The decision here penalizes lawful activity without any showing of a necessary or probable connection between such activity and the feared criminal activity of sabotage and the use of force and violence.

The Court demonstrates a concern for the interests of employers and identifies those interests with the interests of the state. At the same time and by the same decision it allows the employer to deal a serious blow to the interests of employees. This blow is inflicted, at least in part, by abridging the First Amendment rights of employees. Courts must be neutral in the conflict between union and employer.

ARGUMENT.

I.

THE DECISION BELOW INFRINGES FIRST AMENDMENT RIGHTS.

A. This is a First Amendment case.

This is a First Amendment case, although the decision of the California Supreme Court does not mention that

Amendment or the rights which it protects. It is inescapably a First Amendment case, because judicial action necessarily deals with the rights of speech and assembly when it is predicated solely upon membership in the Communist Party.

Whatever else it may do, the Communist Party operates on the basis of theories and employs *speech* in the sense in which the drafters of the constitution employed that term. The meaning of those theories is the subject of much debate and litigation. The party is, of course, an assemblage of persons and while it may have other modes of operation, it clearly seeks in some of its activity to petition the government for the redress of grievances.

The action taken by the Court below in denying enforcement of an arbitrator's award was predicated first and last upon the assumed Communist Party membership of Mrs. Doris Walker. If that assumption is extirpated from the opinion, the opinion is without any rationale. That alleged membership is the "but for" causation for the result reached in this case. Although the opinion speaks as though it were dealing with criminal activity, there is here no charge or evidence of sabotage, treason, nor of any criminal activity. Neither is there any evidence of the aims of the Communist Party, nor of Mrs. Walker's own beliefs. As in *Wieman v. Updegraff*, 344 U.S. 183, it is party membership alone which penalizes. It is that fact which distinguishes this case from other decisions imposing penalties upon Communists.

It is, therefore, an unusual First Amendment case. In the lengthy discussions of earlier First Amendment cases which appear in *Dennis v. United States*, 341 U.S. 494, it

appears that most of the cases dealt with convictions of crime. Most of them involved the constitutionality of statutes. A few of them turned upon the question of sufficiency of the evidence. The case at bar is different from all of those cases in all of these respects.[1]

The only similarity between those cases and this case is that here the California Court construed a statute. But this was a statute providing for specific enforcement of arbitrators' awards. It was construed as inoperative where its enforcement would require an employer to rehire an employee who refused to deny Communist Party membership.

The record is therefore devoid of the material with which this Court ordinarily works in deciding First Amendment questions. There is here no criminal charge nor even any pleadings in a civil action. There is no evidence of the evils at which the rule of the case is directed. The questions of fact which were litigated in the arbitrator's hearing were unconnected with sabotage, treason, or subversion in any form. Except insofar as they related to a permitted exercise of the right of free speech in the process of collective bargaining, they did not deal with speech or assembly.

The California Court did not find the evidence in the record insufficient to support the decision of the arbitrators and the Courts below, but ruled as a matter of law that one conclusion which it found supported by the record

[1]Mr. Justice Frankfurter, J., however, concurring in *Dennis*, recognized in a footnote, 341 U.S. 529, that there were "... decisions in which the Court treated the challenged regulation as though it imposed no real restraint on speech or on the press."

compelled a different decision from that of the Courts below it. That conclusion was the Communist Party membership of Mrs. Walker.

This case will not, therefore, fit into the classifications of First Amendment cases which appear in Mr. Justice Frankfurter's and Mr. Justice Douglas' opinions in *Dennis*, supra. In a civil action to enforce an arbitrator's award the issues were, whether the employer had discharged a union official in the midst of negotiations for a wage increase because of her union activity, or because of falsifications in her application for employment and because the employer believed her to be a member of the Communist Party. The Supreme Court of California has, without legislative or other authority, injected into this case a wholly new rule of law, that is, that members of the Communist Party are without the rights afforded other persons by the California arbitration statute. It decided the case on this new rule of law.

The device used by the California Court to avoid dealing with First Amendment questions was to characterize Communist Party membership as criminal activity. This is an ancient device. It was the device used against Socrates, who was accused of corrupting the youth. Christ (who refused to answer his accusers) was charged with stirring up sedition and claiming temporal power. He was not charged with teaching the brotherhood of man. For publishing an exposition and defense of the Copernican theory, Galileo was accused of violation of an injunction imposed upon him 16 years earlier. The list could be very extended. This Court, however, has recognized that even where there is a criminal statute and a

jury has found that that statute was violated, where there is nevertheless an element of speech in the proscribed conduct an additional question must be faced. The question must be answered whether the constitution, in order to preserve the right to speech and assembly, prohibits punishment of the criminal act. *Dennis v. United States,* 341 U.S. 502. The Supreme Court of California has interpreted that decision of this Court as excluding any question of freedom of speech where an alleged member of the Communist Party is subjected to penalties.

The existence of First Amendment questions means that this case is entitled to strict scrutiny.

B. The decision below denies First Amendment rights.

There is doubtless a question whether the Communist Party as an organization, or its members as individuals do in the furtherance of their communist aims engage in criminal activity. What is beyond dispute, however, is that both the organization and its members do engage in lawful activity. Among their activities is the discussion and dissemination of certain theories based upon the writings of Marx and Lenin. The principal issue in the various trials that have taken place under the Smith Act, 54 Stat. 671, has been whether in teaching the doctrines of Marxism-Leninism the Communists have thereby taught and advocated the necessity or propriety of a violent overthrow of the Government of the United States. As we read the decision of this Court in *Dennis v. United States,* supra, even if it were conceded that teaching their theories does involve such advocacy, this activity would be entirely lawful unless accompanied by an intent to accomplish the

overthrow of the Government of the United States as speedily as circumstances permit. Such discussion and advocacy is *speech* in the sense in which that term is used in the First Amendment.

The Communist Party has undoubtedly also engaged in numerous other types of activity recognized generally as "political", which we take it is a short way of saying that the Communists have exercised their right to assemble and their right to freedom of speech and press to attempt to influence the operation of government in lawful and accepted ways. That the Party has done so in California is beyond doubt. See the decision of the Supreme Court of California in *Communist Party v. Peek*, 20 C. 2d 536.

By reason of her assumed membership in the Communist Party, therefore, Mrs. Walker is deprived of the right to employment, the right to enforcement of an arbitration award which is in all other respects enforceable, and perhaps as Traynor, J., thought (see his dissenting opinion, 43 C. 2d 809, *et seq.*), she is deprived of *all* civil rights. These penalties are visited upon her without a trial on the issue of her membership in the Communist Party or her adherence to, and participation in any illegal conspiracy. Thus she is visited with a sanction worse than that recognized by this Court in *United States v. Lovett*, 328 U.S. 303, without a judicial trial in the accepted sense of that term.

The petitioning trade union is likewise deprived of enforcement of its collective bargaining agreement, of its right to have as a member any person it accepts without regard to that person's political affiliation or activities, and of its right to engage in collective bargaining without

subjecting its representatives to discharge because of their activities on behalf of the union. And the penalty visited upon the petitioner was visited because of activity which necessarily included the exercise of First Amendment rights by one of the members of that union. No other rationale for the decision appears.

Of course, the constitutionality of a judicial decision or of a statute which imposes restraints upon First Amendment rights does not depend upon whether the operation of the statute is immediately and directly upon speech or assembly. The requirement that one register as a labor organizer (*Thomas v. Collins*, 323 U.S. 516), or that one salute the flag (*W. Virginia Board of Education v. Barnette*, 319 U.S. 624), or that one obtain a permit to solicit for a charitable or religious organization (*Cantwell v. Connecticut*, 310 U.S. 296), may be invalid although only indirectly aimed at First Amendment rights. See *Grosjean v. American Press Co.*, 297 U.S. 233; *Near v. Minnesota*, 283 U.S. 697.

The effect of the decision of the California Supreme Court in this case is that envisioned as a possibility by Mr. Justice Black in his dissenting opinion in *American Communications Assn. v. Douds*, 339 U.S. 382:

> "... statutes barring Communists and their suspected sympathizers from election to political office, mere membership in unions, and in fact from getting or holding any jobs whereby they could earn a living ..."

Since the First Amendment, as incorporated in the Fourteenth Amendment, does not mean that no restraint on speech may be valid, the question that remains for

examination is whether the restraint on speech and assembly imposed by the decision below in this case is constitutional.

II.

THE INFRINGEMENT OF FIRST AMENDMENT RIGHTS IN THIS CASE IS UNCONSTITUTIONAL.

A. The interests sought to be protected are too insubstantial or too remote.

The interests which the Supreme Court of California here seeks to protect are as follows:

1. *Loyalty to employer:* Relying upon the decision of the California court in *Garner v. Board of Public Works,* 98 C.A. 2d 493, affirmed 341 U.S. 716, (holding that loyalty is implicit in the contract of hire, and *public* employees may be required to take a loyalty oath), the Court below seeks to protect the interest of private employers in having employees who are personally loyal to them.

2. *Protection of the employer from civil liability:* "Knowing the facts which the company knew," said the Court below, "it is difficult to conceive of any tenable defense which it could make, or which would be entertained in this court, as against an action for damages in a personal injury or wrongful death case arising from the wilful adulteration of any of its products by Mrs. Walker if it continued her in its employ and she should thereafter take that means of party activity."

3. *Protection of the employer and his customers against sabotage:* Said the Court below, "In this connection . . . the employer had not only the right to protect itself and

its customers against the clear and present danger of continuing a Communist Party member in its employ, but also the duty to take such action as it deemed wise to preserve order in its plant and protect its other employees, both union and nonunion, against the same danger and the possibility of 'sabotage, force, violence and the like' ".

4. *Protection of the Government of the United States against destruction:* The Court held that if it were to make an order requiring the reinstatement of Mrs. Walker to her employment as a clerk-typist, "The courts of this country by making such an order would be but aiding toward the destruction of the government they are sworn to uphold."

This Court, in *Dennis,* recognized that in many cases which have raised the question of First Amendment rights, the infringments proposed were struck down because they were insubstantial. *Dennis v. U. S.,* supra at p. 508. The cases listed by the Chief Justice, and the interests there involved were as follows: *Schneider v. State,* 308 U.S. 147, keeping the streets free of litter, and protecting the householders of the city from disturbance and annoyance by visits by day or by night from unknown strangers.

Cantwell v. Connecticut, 310 U.S. 296, protection of the public against fraudulent solicitation for charitable or religious contributions.

Martin v. Struthers, 319 U.S. 141, protection of householders against annoyance by handbill distributors knocking at the door.

West Virginia Board of Education v. Barnette, 319 U.S. 624, the interest in "national unity".

Thomas v. Collins, 323 U.S. 516, the reasonable regulation of labor unions in the public interest.

Marsh v. Alabama, 326 U.S. 501, the right of the owners of a "company town" to restrict the distribution of religious literature.

It is not possible, of course, to calculate mathematically the magnitude of these various state interests. Undoubtedly the regulation of labor unions is a matter of tremendous importance, while protecting householders from annoyance is not. But these cases have in common this: the state involved sought to protect interests which are quite proper concerns of government, and which could constitutionality be protected *if an appropriate means were used.* But where the means used infringed freedom of speech, "the glory of our system of government" as Mr. Justice Douglas called it (*Dennis,* supra, at p. 590), the danger must be to something as vital as the obedience of its soldiers (*Frohwerk v. United States,* 249 U.S. 204), the ability to raise armed forces by a compulsory draft (*Schenk v. United States,* 249 U.S. 47), the danger of political strikes in the period of the "cold war" with the Soviet Union (*American Communications Assn. v. Douds,* 339 U.S. 382). That men may now differ about the wisdom of the decisions in one or more of those cases does not militate against the fact that the interests said there to be immediately and gravely threatened were beyond doubt "substantial".

How is it with the case at bar? May a state restrict freedom of speech, of assembly, of political action and political advocacy in order to insure employers of the loyalty of their employees, not to the state, but to those

employers? It has not been wholly unknown for the employer to cheat their employees of wages due them, to employ thugs and professional spies and strikebreakers against them even in defiance of law, to obtain the services of metropolitan police to shoot them down during peaceful demonstrations. May workers who have suffered such things be required to remain silent lest they be accused of "disloyalty" to their employers? If they do not remain silent, are they to be subject to state-applied sanctions because they have violated a cardinal state interest? Is loyalty to an employer procurable by state action?

Or the protection of employers from damage suits because of adulteration of their products by their employees—is that the sort of threat to the State of California or those vital to its interests, that justifies the halfmasting of the right to freedom of speech?

The first three of the interests advanced as worthy of this kind of protection thus are wholly inadequate to support an exception to our basic law, which says that Congress "shall make no law abridging . . ." the rights which we believe are here abridged.

There is another interest which the Supreme Court of California is seeking to protect, and that one cannot be called insubstantial: The protection of the government of this country against destruction. But here the proposition that by enforcing a decree for reinstatement of a clerk in private employment, the Court would be aiding in the destruction of the government is without substance. As we read the majority opinion in *Dennis*, the Holmes-Brandeis rationale as expressed, for example in *Whitney v. California* 274 U.S. 357, is current rul It re es

clear evidence that there is a real danger, not one wholly conjectural and incalculably remote. There is no such evidence here.

B. There is no showing of a clear and present danger.

Although the Court below neglected to mention it, the judgment of that Court must meet the test first enunciated in the *Schenk* case, and since then accepted as the black letter law in this field: that there must be evidence of a clear and imminent danger of an evil which the legislature may take measures to avert. The present case seems to us to fail on every phase of this test. The absence of any danger which may be warded off by restricting speech has already been discussed. It seems to be amply clear also that there is no real imminence of danger, even if it be accepted that the danger is inchoate in the situation. But perhaps the most striking lack in this whole picture is the absence of *evidence* that there is any problem requiring the state to withhold from petitioner what it would admittedly be entitled to except for the alleged Communist Party membership of Mrs. Walker.

The conclusion that Mrs. Walker was a member of the Communist Party is based primarily on her refusal to answer the question whether she was one. Except after the decision of the California Supreme Court, there was never any reason to suppose that her membership in the Party was a material question. The issue was, what was the motive for the company's discharge of Mrs. Walker during her participation in wage negotiations? The company said it was their *belief* in her Communist Party

membership, plus other matters. The union maintained it was her union activity. Whether the company's belief was well or ill founded was a matter wholly unnecessary to decision. This was the theory on which the union conducted its case. There was therefore no occasion for any trial of the issue of her membership, and that issue was not in fact tried.

Likewise there was no issue as to the aims and objectives of the Communist Party. There is no evidence in the record on this point, because until the decision of the Court below nobody conceived it to be a matter at issue. The material relied upon by the Court below (legislative findings, judicial opinions and a Presidential speech) would not be accepted as evidence in a prosecution for a traffic violation, yet it is used here to support a decision which attaints and brands one presumed to be innocent until proven guilty. On the findings of the legislature, set forth in a statute which elaborate procedural safeguards for the process by which the identity of the members of the Communist conspiracy may be determined, the Court below rejects the most elementary of rights, the right to have a case heard and decided on evidence produced in open Court.

Finally, and no less important than the foregoing, there is the complete absence of any evidence that, if the aims of the Communist Party are those set forth in the Internal Security Act of 1950 as the aims of the Communist conspiracy, Mrs. Walker subscribed to them. Membership (assumed, not proved) and membership alone is punished here. This is unconstitutional. *Wieman v. Updegraff*, 344 U.S. 183.

III.

THE DECISION BELOW IS DANGEROUS TO DEMOCRACY.

No extended discussion of the danger to democracy of infringements of the rights of speech, press and assembly could add any useful increment to the things that have been accepted by this Court as the rationale of the First Amendment. What can usefully be developed here is the evil which this particular form of impairment of protected rights may reasonably be expected to work.

Perhaps the first and most dangerous aspect of this case is that it masquerades as a case involving the protection of the state and of employers alone. Unless the Courts, and particularly the Supreme Courts of the country frankly recognize the conflict with which this Court has been concerned in *Douds*, in *Dennis*, and in many other recent cases, the protection those Courts are required to give to our fundamental liberties is gone.

The recognition of First Amendment rights is not an excursion into self-destruction by the governments of our country. It is on the contrary a necessarily constant reaffirmation of that which makes those governments unassailable.

The opinion below has also this peculiarity—it penalizes with equal severity lawful and unlawful activity of members of the Communist Party. Reading the opinion of the Court below, it is impossible to find in it a warning against some activity which is dangerous to the state and forbidden to the individual, unless it be the use of sabotage, force and violence. Those are crimes under many statutes of ancient vintage. Here the activity of a

Communist as a clerk-typist, as a shop steward and as a member of a union negotiating committee are penalized, though there has been no demonstration of any necessary connection between apprehended crimes and those activities.

An aspect of the decision below which will surely not escape the sharp eyes of our critics abroad and at home is the identification of the rights of employers with those of the state, while at the same time the rights of unions and employees are allowed to suffer a serious blow. The Court below finds a state-protected right and duty to discharge a Communist Party member. The duty, apparently, is one which may be discharged whenever the employer finds it convenient to do so. If he decides to wait two years after learning of the party membership of an employee, until the employee is doing effective work as a union negotiator, the duty is to discharge the employee at that time. No impartial concern for employers and unions alike is thus demonstrated.

For the reasons advanced above, the decision of the California Supreme Court should be reversed.

Dated, San Francisco, California,
April 20, 1956.

Respectfully submitted,

CHARLES R. GARRY,

Attorney for National Lawyers Guild, San Francisco Chapter, Amicus Curiae.